



**Billing Code: 4410-19**

**DEPARTMENT OF JUSTICE**

**28 CFR Parts 20, 22, 36, 68, 71, 76, and 85**

**[Docket No. OAG 148; AG Order No. 4424-2019]**

**Civil Monetary Penalties Inflation Adjustment**

**AGENCY:** Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** The Department of Justice is finalizing without change an interim rule published on June 30, 2016, adjusting for inflation the civil monetary penalties assessed or enforced by components of the Department, in accordance with the provisions of the Bipartisan Budget Act of 2015.

**DATES:** *Effective date:* This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Room 4252 RFK Building, 950 Pennsylvania Avenue, NW, Washington, DC 20530, telephone (202) 514-8059 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:** In this final rule, the Department of Justice (Department) finalizes the interim rule that was published on June 30, 2016 (81 FR 42491). Readers may refer to the Supplementary Information (also known as the preamble) of the Department's interim rule for additional background information regarding the statutory authority for adjustments of civil monetary penalty amounts for inflation and the Department's past implementation of inflation adjustments. After consideration of the public

comments submitted in response to the interim rule, the Department is finalizing the interim rule without change for the reasons discussed below.

This final rule makes no change in the amount of the civil penalties as adjusted in the 2016 interim rule, which is applicable to civil penalties assessed after August 1, 2016. Since the publication of the interim rule, the Department has twice published other rules that have further adjusted the amounts for civil penalties assessed in subsequent calendar years, as required by law. On February 3, 2017 (82 FR 9131), the Department published a final rule adjusting for inflation the civil monetary penalties that it assesses or enforces for penalties assessed after February 3, 2017, and on January 29, 2018 (83 FR 3944), the Department published a final rule adjusting for inflation the civil monetary penalties that it assesses or enforces for penalties assessed after January 29, 2018. But since this final rule finalizes the provisions of the 2016 interim rule without change, there is no need for any revisions to the adjusted civil penalty amounts that are applicable for penalties assessed in 2016, 2017, or 2018.

## **I. Revised Statutory Process for Implementing Annual Inflation Adjustments**

Section 701 of the Bipartisan Budget Act of 2015, Public Law 114-74 (Nov. 2, 2015), titled the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (“2015 Amendments”), 28 U.S.C. 2461 note, substantially revised the prior provisions of the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, Public Law 101-410 (“Inflation Adjustment Act”), and substituted a different statutory formula for calculating inflation adjustments on an annual basis.

In accordance with the provisions of the 2015 Amendments, on June 30, 2016 (81 FR 42491), the Department of Justice published an interim final rule with request for comments

(“interim rule”) to adjust for inflation the civil monetary penalties assessed or enforced by components of the Department.

As discussed in greater detail in the preamble to the interim rule, the 2015 Amendments set forth a new method of calculation for the initial adjustment following the 2015 Amendments. For the initial adjustment, the “cost-of-living adjustment,” which sets the amount by which the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, would be increased, is defined as “the percentage (if any) for each civil monetary penalty by which the Consumer Price Index for the month of October 2015 exceeds the Consumer Price Index for the month of October of the calendar year during which the amount of such civil monetary penalty was established or adjusted under a provision of law other than this Act.” Public Law 114-74, sec. 701(b)(2)(B) (amending section 5(b) of the Inflation Adjustment Act). This adjustment is to be applied to “the amount of the civil monetary penalty as it was most recently established or adjusted under a provision of law other than this Act,” and “shall not exceed 150 percent of the amount of that civil monetary penalty on the date of enactment of” the 2015 Amendments. *Id.*

The 2015 Amendments authorized the Department, with the concurrence of the Director of the Office of Management and Budget, to make a determination in certain circumstances to increase a civil penalty by less than the otherwise required amount. However, the interim rule did not invoke that authority. The adjustments to existing civil monetary penalties set forth in the interim rule were calculated pursuant to the statutory formula.

The 2015 Amendments also amended section 6 of the Inflation Adjustment Act to

provide that “[a]ny increase under this Act in a civil monetary penalty shall apply only to civil monetary penalties, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect.”

## **II. Adjustments Made in the Department’s June 2016 Interim Rule for Civil Monetary Penalties**

In accordance with the 2015 Amendments, the adjustments made by the Department’s interim rule were based on the Bureau of Labor Statistics’ Consumer Price Index for October 2015. The inflation factors used in Table A in the preamble of the interim rule were provided to all federal agencies in the Office of Management and Budget Memorandum for the Heads of Executive Departments and Agencies M-16-06 (Feb. 24, 2016), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf> (last visited February 26, 2019). Table A in the preamble of the interim rule provided the new penalties, as adjusted for inflation by the interim rule, as well as the calculations upon which the inflation adjustments were made.

The interim rule revised 28 CFR 85.3 to provide that the inflation adjustments set forth in that section continue to apply to violations occurring on or before November 2, 2015, the date of enactment of the 2015 Amendments, as well as to assessments made before August 1, 2016, whose associated violations occurred after November 2, 2015. Other existing Department regulations provided for inflation adjustments of other civil penalties under prior law, such as the civil penalties under certain provisions of the immigration laws in 28 CFR 68.52. Those other existing regulations were also revised to provide that the preexisting regulatory inflation adjustments continue to apply to violations occurring on or before November 2, 2015, as well as to assessments made before August 1, 2016, whose associated violations occurred after November 2, 2015.

The interim rule added a new provision, 28 CFR 85.5, adjusting for inflation the civil monetary penalties within the jurisdiction of the Department of Justice for purposes of the Inflation Adjustment Act, as amended by the 2015 Amendments.

Other agencies are responsible for the inflation adjustments of certain other civil monetary penalties that the Department's litigating components bring suit to collect. The reader should consult the regulations of those other agencies for inflation adjustments to those penalties.

### **III. Inflation Adjustments for Future Years**

This rule finalizes the interim rule that implemented the initial adjustments of civil penalty amounts for civil penalties, effective on August 1, 2016. After the initial adjustments made in 2016, the 2015 Amendments provide a different process for annual adjustments in future years. The Department will be implementing the adjustment of civil penalties for future years in subsequent actions to be published in the Federal Register. As noted above, the Department has already published rules on February 3, 2017, and January 29, 2018, making the required annual adjustments in civil penalty amounts.

### **IV. Comments Received on the Interim Rule**

Before the interim rule's comment period closed on August 29, 2016, the Department received comments from six commenters. The Department has carefully considered all the comments, which are grouped and discussed below by subject with the Department's responses.

#### *A. Rounding of the adjusted civil penalty amounts.*

One comment asked the Department to simplify civil penalty adjustments by using more even amounts. In particular, the interim rule adjusted the False Claims Act civil

penalties to a minimum of \$10,781 and a maximum of \$21,563, and the commenter suggested rounding those amounts to \$10,750 and \$21,500, respectively.

In response, the Department notes that the 2015 Amendments require that the adjusted civil penalties be calculated under the statutory formula to the nearest multiple of \$1. *See* Public Law 114-74, sec. 701(b)(2)(A) (amending section 5(a) of the Inflation Adjustment Act). Accordingly, unlike the approach of the former statutory process, the Department is not authorized to round the adjusted civil penalties to the nearest \$50 or \$100 or some other amount.

*B. Comments with regard to possible assessment of large amounts of civil penalties for many minor violations; concerns about “grossly excessive” penalties and “excessive fines.”*

Several comments expressed concerns that many penalties are assessed on a “per violation” basis without considering the magnitude of the harm or damage; they object that, if there are a large number of minor violations, a very large penalty could result that far exceeds the loss attributable to those violations. The comments also raised concerns about penalty amounts possibly being so high as to violate the limits under the Due Process Clause’s prohibition of penalties that are “grossly excessive” or the Eighth Amendment’s prohibition against “excessive fines.”

These concerns were particularly focused on the assessment of penalties under the False Claims Act, 31 U.S.C. 3729 *et seq.*, although commenters also expressed similar concerns that the interim rule resulted in a near doubling of adjusted civil penalties under other laws including the Anti-Kickback Act, the Americans With Disabilities Act, and the Controlled Substances Act.<sup>1</sup> For these reasons, commenters suggested that the

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<sup>1</sup> With regard to the Americans With Disabilities Act penalties in particular, the Department notes that the civil penalty amounts for violations of that law had already been adjusted by regulation pursuant to the prior inflation

Department should not be increasing the applicable civil penalties as set forth in the interim rule.

For the reasons explained below, the Department has considered these arguments but has decided not to invoke the authority under the 2015 Amendments to set the civil penalty amounts at levels less than those adjustments as provided under the interim rule. Under the 2015 Amendments, the relevant civil penalty amounts were adjusted to conform to the levels of inflation since the penalties were last established or adjusted under a provision of law other than the Inflation Adjustment Act. (The only exceptions to that straight inflation adjustment were the result of the statutory cap on adjustments that Congress provided to keep certain adjusted civil penalty amounts from increasing by more than 150 percent of existing levels.)

The Department understands the general concern that there may be a potential for imposition of a large penalty that, under the particular circumstances of specific violations, might be argued to be disproportionate or excessive. The Department notes, however, that the 2016 interim rule being finalized by this final rule only established the maximum amount (and, for some penalties, the minimum amount) that could be imposed for violations. This rule does not require the Department to seek the maximum number or amount of penalties that may be available in any particular case.

In particular, the commenters' concerns about the potential imposition of numerous large civil penalty amounts for a series of small dollar-amount violations can be addressed

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adjustment formula, for example, from a maximum of \$55,000, for first violations occurring on or after September 29, 1999, to a maximum of \$75,000 for first violations occurring on or after April 28, 2014. Because of this 2014 increase, the adjusted civil penalty maximum amount of \$89,078 in the interim rule for first violations, effective for civil penalty assessments after August 1, 2016, represents an increase of less than 19 percent from the 2014 level of \$75,000 and not a near doubling as asserted by the comment. *Compare* 28 CFR 36.504(a)(3)(i), with 81 FR 42491, at 42495 (June 30, 2016).

in how the civil penalty provisions are administered in individual cases rather than by adjusting the amount of each civil penalty by less than the statutory formula requires. One commenter gave the example of the potential imposition of 1,000 separate civil penalties totaling over \$21 million in response to a series of 1,000 false claims for prescriptions of \$10 each (i.e., where the loss to the government totaled \$10,000); another commenter offered a hypothetical where a series of 15,000 occurrences of a \$2.50 billing mistake might lead to a healthcare institution being subject to multiple penalties totaling over \$161 million. In these examples, the concern is about the application of the civil penalties to particular circumstances.

The Department has concluded that the prospect of this kind of potential imposition of multiple separate penalties in particular cases does not support an across-the-board reduction in the inflation adjustment for the individual penalties in all instances in which they may be imposed. The statutory civil penalties as provided by Congress, and as adjusted pursuant to the 2015 Amendments, are applicable to all statutory violations – regardless of the amounts at issue for particular violations. To the extent that commenters are objecting that the civil penalty amounts set by the False Claims Act or other statutes were *already* disproportionately high, i.e., prior to the enactment of the 2015 Amendments, and offering that as a reason for not adopting the inflation adjustments called for by the 2015 Amendments, the crux of their complaint lies in the amount initially established or adjusted by Congress, not in how the penalties are adjusted for inflation pursuant to the 2015 Amendments.

Instead of lowering the inflation adjustment amount for a particular civil penalty across the board, which would affect all applications, whether they involved large or



small dollar amounts, the Department believes that a fair result can be achieved in how civil penalties are sought in particular cases, as well as during settlement discussions, where the parties have an opportunity to discuss individual circumstances, the severity of the damage or harm caused by the violation, and any mitigating factors in favor of a less-than-maximum penalty. Moreover, in cases that proceed to litigation, the Department may elect to pursue fewer than the maximum number of actionable penalties or an amount less than the maximum penalty amount. Finally, we note that the parties will continue to be able to challenge the imposition of particular civil penalty assessments in court that they regard as disproportionate or excessive given the circumstances of the particular case.

Finally, the Department notes that the statute only permits applying a lower inflation adjustment in certain circumstances (i.e., where the head of the agency determines that “(A) increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact; or (B) the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits” and the Director of the Office of Management and Budget concurs). The Department has considered the concerns presented in the public comments and continues to believe that these circumstances are not present with respect to these inflation adjustments.

For the foregoing reasons, the Department is not reducing the inflation adjustments in the 2016 interim rule for violations of the statutory provisions in question.

*C. Comments concerning the calculation of the adjustments for the False Claims Act.*

Two comments challenged the Department’s calculation of the inflation adjustments for violations of the False Claims Act (FCA), contending that the Department erred by

overlooking the 2009 amendments to the FCA in the Fraud Enforcement and Recovery Act of 2009 (FERA), Public Law 111-21, sec. 4 (2009). These commenters assert that the base year for making the inflation adjustment calculations should be 2009, rather than 1986, because in their view the 2009 amendments to the FCA constitute the last time the FCA penalties were “established or adjusted” by law other than the Inflation Adjustment Act. *See* Public Law 114-74, sec. 701(b)(2)(B) (amending section 5(b) of the Inflation Adjustment Act).

In support of their argument, the commenters point to statutory language added to the FCA in 2009 to clarify that the 1986 penalty amounts are subject to adjustment by the Inflation Adjustment Act. Specifically, the FCA was amended in 2009 to state that a defendant is liable to the United States “for a civil penalty of not less than \$5,000 and not more than \$10,000, *as adjusted by the [Inflation Adjustment Act]*.” Public Law 111-21, sec. 4(a)(1) (emphasis added). The commenters note that, at the time the FCA was amended in 2009, the original statutory penalties ranging from \$5,000-\$10,000 had been adjusted for inflation by regulation to a range of \$5,500-\$11,000. The commenters suggest that because the 2009 amendments clarified that the \$5,000-\$10,000 range should be adjusted by the Inflation Adjustment Act, and, because the range had already been adjusted for inflation by regulation to \$5,500-\$11,000, the 2009 amendments to the FCA represent a time when Congress “established or adjusted” the penalty amount “under a provision of law other than” the Inflation Adjustment Act. *See* Public Law 114-74, sec. 701(b)(2)(B) (amending section 5(b) of the Inflation Adjustment Act). The commenters contend that, therefore, the Department’s inflation adjustment for 2016 should use a base year of 2009 for the inflation calculations for the FCA, instead of 1986 when the civil penalties of \$5,000 to \$10,000 were

originally established by Congress. The commenters note that using 2009 as the base year would yield a substantially smaller increase in the civil penalty range in the 2016 interim rule for each FCA violation.

The Department does not find the commenters' analysis persuasive. The 2015 Amendments make clear that the base year for the "cost-of-living adjustment" for the initial inflation adjustment is the "calendar year during which the amount of [the relevant] civil monetary penalty was established or adjusted under a provision of law other than [the Inflation Adjustment] Act." Public Law 114-74, sec. 701(b)(2)(B) (amending section 5(b) of the Inflation Adjustment Act). The relevant question, then, is whether the 2009 amendments to the FCA "established or adjusted" the FCA civil monetary penalties "under a provision of law other than" the Inflation Adjustment Act. We conclude that they did not.

The statutory amendments enacted by Congress in 2009 did not specify the amounts of \$5,500 to \$11,000 as the range of the adjusted civil penalty amounts at that time, and, following these amendments, the civil penalty amounts remained exactly the same as they had been before the 2009 amendments, as did the methodology for calculating those amounts. The statutory text added to the FCA in 2009 did not "establish[] or adjust[]" the civil monetary penalties pursuant to the FERA, rather it merely provided clarification that the 1986 penalty amounts of \$5,000 and \$10,000 were intended to remain subject to previous and future inflation adjustments under the Inflation Adjustment Act. Moreover, if pre-2015 applications of the Inflation Adjustment Act itself do not qualify as "establish[ing] or adjust[ing]" the civil penalty amounts for purposes of the 2015 Amendments—as the 2015 Amendments make quite clear—then a statutory provision merely clarifying the continued applicability of the Inflation Adjustment Act to the 1986 penalty amounts also should not

qualify as “establish[ing] or adjust[ing]” the civil penalty amounts for purposes of the 2015 Amendments. For these reasons, we conclude that the interim rule correctly used 1986, instead of 2009, as the appropriate base year for the adjustment of the relevant penalties.

*D. Comments on penalty adjustments of “Immigration-Related Penalties.”*

The Department received several related comments concerning the application of the inflation adjustments to penalties for violations of the requirements in section 274A of the Immigration and Nationality Act (INA), 8 U.S.C. 1324a, for verifying the identity and employment authorization of individuals hired for employment in the United States.

As background, the Department notes that the process for imposition of civil penalties for violations of section 274A of the INA is divided between two separate Departments. The Department of Homeland Security (DHS)’s Immigration and Customs Enforcement (ICE) is responsible for enforcing the requirements of section 274A of the INA and of DHS’s implementing regulations at 8 CFR part 274a. If, however, the subject of a civil penalty sought by ICE requests a hearing, the hearing is conducted and adjudicated by an administrative law judge (ALJ) in the Office of the Chief Administrative Hearing Officer (OCAHO), which is part of the Department’s Executive Office for Immigration Review (EOIR). The Department’s rules for conduct of such ALJ hearings are contained in 28 CFR part 68, and the civil penalty provisions are set forth in 28 CFR 68.52. Consistent with the statutory structure providing for EOIR to issue final decisions in cases where a hearing is sought, the Department’s 2016 interim rule adjusted the civil penalty amounts set forth in § 68.52. DHS published its own rule on July 1, 2016 (81 FR 42987), that adjusted civil penalty amounts set forth in the DHS regulations, including adjustment of the applicable civil penalties in 8 CFR part 274a.

The comments on the Department's interim rule included the following contentions, and are accompanied by the Department's responses:

- The Department should refrain from increasing the civil penalty for the failure to notify the government if an employee continues to work after a final non-confirmation of the employee's employment eligibility in E-Verify, until the Department of Labor (DOL) issues a revised regulation addressing the "practical application of the 'failure to notify' rule."

In response, the Department notes that this concern pertains not to the amount of the 2016 inflation adjustment to the civil penalty in question, as such, but instead to how employers who use the E-Verify system can provide the appropriate notification to the government of the employer's actions with respect to a non-confirmed employee. This is an operational issue pertaining to the applicable legal requirements, and the Department has concluded that this concern does not warrant a reduction in the otherwise-applicable inflation adjustments for the civil penalty in question.

This comment also contended that, as a notification process for final non-confirmations is built into E-Verify, and considering the very limited situations in which an employer would continue to employ the individual following a final non-confirmation, it may not even be necessary to raise this penalty. In response, the Department notes that any such relevant concerns can be presented to the extent they may arise in individual cases, but concludes that these considerations do not warrant a change in the calculations of the applicable civil penalty adjustments as provided by the 2015 Amendments.

- The Department should not increase the civil penalties for employment eligibility verification violations under 8 U.S.C. 1324a(e)(5) (otherwise known as "Form I-9

violations” or “paperwork violations”), to avoid unduly penalizing employers for innocent mistakes, and to avoid burdening the Department with increased litigation before OCAHO.

In response, the Department believes it is appropriate to follow the statutory formula with respect to the 2016 interim rule’s adjustment of these penalties. In the case of civil penalties for so-called paperwork violations under 8 U.S.C. 1324a(e)(5), Congress in 1986 had set a minimum penalty of \$100 and a maximum penalty of \$1,000. Under the previous formula for inflation adjustments, these penalties had only been adjusted for inflation by 10 percent (to \$110 and \$1,100, respectively), since they were first enacted in 1986. See 28 CFR 68.52(c)(5) (2016). (These particular penalties fell below the “rounding threshold” under the former provisions of the Inflation Adjustment Act at the time other immigration-related civil penalties were adjusted in 2008, despite a 25-percent increase in inflation since the adoption of the 10 percent inflation adjustment in 1999. See 73 FR 10130, 10133 (Feb. 26, 2008).) As a result, the penalties had lost much of their deterrent effect relative to the deterrent effect of the penalty amounts originally established by Congress thirty years ago. The adjustments to the civil penalties for paperwork violations promulgated in the 2016 interim rule simply restored the present-day deterrent effect of the relevant penalties to the deterrent effect of the penalty levels originally set by Congress by adjusting the penalties for the inflation that has occurred since the penalties were originally set.

Moreover, as the commenter notes, Congress has already provided a response to the concerns voiced by the commenter regarding innocent mistakes, by enacting section 411(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which allows a good faith defense for technical and procedural violations unless the employer failed to

correct errors within 10 business days after notice, or there was a pattern or practice of violations. In the course of OCAHO hearings, the ALJs are able to take account of such contentions regarding innocent mistakes in setting the civil penalties to be imposed in individual cases. The Department does not agree that these arguments would warrant a decision not to adjust the civil penalties here for inflation, particularly since setting the civil penalties at a lower level would be applicable to all violations, whether intentional or innocent.

It is speculative to suggest that increased penalties will lead to increased litigation before OCAHO, but OCAHO continuously evaluates its caseload and staffing needs, and pursues staffing and resource changes whenever necessary and appropriate. The prospect of increased litigation is not a convincing reason for the Department not to abide by the statutory formula.

Finally, as the Department believes it is appropriate for the 2016 interim rule to follow the statutory formula with respect to the civil penalties for employment eligibility verification violations, the Department respectfully declines to invoke the authority, under section 4(c) of the Inflation Adjustment Act, to increase these penalties by less than the required amount. See Public Law 114-74, sec. 701(b)(1)(D) (adding Section 4(c) to the Inflation Adjustment Act). The Department similarly declined to invoke this authority in the 2016 interim rule adjusting these civil monetary penalties. See 81 FR 42491, 42493.

- The Department's increases in the civil penalty amounts should be delayed until DHS publishes its final rule on technical and substantive violations pertaining to Form I-9 and issues its new Form I-9.

In response, as noted above, the Department believes it is appropriate to follow the

statutory formula with respect to these penalties, among other things, in order to maintain the penalties' deterrent effect, and the Department does not believe that invoking the authority of section 4(c) of the Inflation Adjustment Act is appropriate in this context. As the commenter notes, guidance on the distinction between technical and substantive violations is already available to the public, both in memoranda adopted or issued by ICE and in numerous published precedent decisions from OCAHO. The fact that DHS has not yet issued its final rule on technical versus substantive violations does not justify delaying implementation or adjusting the penalty by less than the statutory formula requires. Moreover, since the commenter has submitted this comment, DHS has published its revised Form I-9. (See Revised Form I-9, issued Nov. 14, 2016; see also Revised Form I-9, issued July 17, 2017). To the extent that the commenter has comments or concerns about DHS's revisions to the Form I-9, those are appropriately raised with DHS pursuant to the public comment process for information collections under the Paperwork Reduction Act. Accordingly, the Department does not believe that the increase in the civil penalty amounts should be delayed, or set at amounts less than the amounts set forth in the 2016 interim rule, which follow the statutory formula set forth in the 2015 Amendments.

- The Department and DHS should increase the civil penalties for paperwork violations by no more than 20 percent of the preexisting civil penalties, and no more than 10 percent for violations under 8 U.S.C. 1324a(e)(5) where the employer can produce documentation demonstrating that the employee was verified through the E-Verify system.

In response, the Department notes that this is an alternative to the commenter's prior arguments, which contended that the inflation adjustments for paperwork violations should



be eliminated. This alternative argument is that if the relevant penalties are adjusted for inflation pursuant to the 2015 Amendments, the inflation adjustments as set in the 2016 interim rule should be capped at 20 percent generally, and at 10 percent where the employer can produce documentation demonstrating that the relevant employees were verified through the E-Verify system. As explained above, the Department does not agree with the commenter's contentions that the inflation adjustments of the civil penalties for these violations of the employment eligibility verification requirements should be eliminated altogether. The Department views the relevant adjustments derived from the statutory formula as appropriate, and has concluded that invoking its authority to reduce the adjustments pursuant to section 4(c) of the Inflation Adjustment Act would not be appropriate in this context.

- The Department should use any additional funds generated by the inflation adjustment for Form I-9 paperwork violations to increase staffing and training throughout the relevant agencies.

In response, the Department notes that it does not itself collect the penalties assessed under the relevant provisions of section 274A of the INA, 8 U.S.C. 1324a, and thus it cannot dictate how any additional funds will be used.

*E. Comment asserting that the inflation adjustments in the interim rule should not be applicable to violations occurring prior to the effective date of the rule.*

The Department received a comment asserting that inflation adjustments adopted in the 2016 interim rule should have been made applicable only with respect to violations occurring on or after August 1, 2016, the effective date of the rule, rather than with respect to violations occurring after November 2, 2015. The commenter suggests that the approach of

the interim rule constitutes retroactive application of the adjusted penalty amounts.

In response, the Department declines to adopt this comment's suggestion. The 2015 Amendments amended section 6 of the Inflation Adjustment Act to provide that "[a]ny increase under this Act in a civil monetary penalty shall apply only to civil monetary penalties, *including those whose associated violation predated such increase*, which are assessed after the date the increase takes effect." (emphasis added). Congress's specific reference to applying the adjustments to civil monetary penalties "whose associated violation predated" the effective date of the adjustment clearly contemplates that the inflation adjustments under the 2015 Amendments can be applied to violations occurring prior to the effective date of the increased civil penalty amounts—but only if the civil penalties are "assessed after the date the increase takes effect." This is precisely the approach the interim rule takes.

The interim rule became effective August 1, 2016. The adjusted civil penalty amounts in the interim rule are applicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, the date of enactment of the 2015 Amendments. The Department has concluded that this approach is a permissible interpretation of the language of section 6 as amended and does not result in an impermissible retroactive application of the inflation adjustments. Accordingly, this approach is adopted in the final rule without change.

## **V. Statutory and Regulatory Analyses**

### *Administrative Procedure Act*

Because the statute requires that the catch-up adjustment be done through an interim final rulemaking and that subsequent adjustments be done notwithstanding the requirements

of 5 U.S.C. 553 (*see* section 4(b)(1) & (2) of the Inflation Adjustment Act), the Act can be read to provide that the requirement in section 553(d) for a 30-day delayed effective date does not apply to finalizing the interim final rule regarding the catch-up adjustment, particularly where this final rule makes no change to the interim final rule. Alternatively, to the extent section 553(d) may be applicable, the Department finds that there is good cause to make the rule effective immediately pursuant to 5 U.S.C. 553(d)(3), given that any delay is unnecessary since the rule is already in effect as an interim final rule and this final rule makes no change to it.

#### *Regulatory Flexibility Act*

Only those entities that are determined to have violated federal law and regulations would be affected by the increase in the civil penalty amounts made by this rule. A Regulatory Flexibility Act analysis is not required for this rule because publication of a notice of proposed rulemaking was not required. *See* 5 U.S.C. 603(a).

#### *Executive Orders 12866 and 13563 – Regulatory Review*

This final rule has been drafted in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), The Principles of Regulation, and in accordance with Executive Order 13563, “Improving Regulation and Regulatory Review” section 1, General Principles of Regulation. Executive Orders 12866 and 13563 direct agencies, in certain circumstances, to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

The Department of Justice has determined that this rule is not a “significant

regulatory action” under Executive Order 12866, “Regulatory Planning and Review,” section 3(f), and accordingly this rule has not been reviewed by the Office of Management and Budget. This final rule adopts without change the provisions of the 2016 interim rule, which itself was determined not to be a significant regulatory action under Executive Order 12866.

*Executive Order 13132 – Federalism*

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

*Executive Order 12988 – Civil Justice Reform*

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

*Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*Congressional Review Act*

This rule is not a major rule as defined by section 251 of the Congressional Review Act, 5 U.S.C. 804. It will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, federal,

state, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

## **List of Subjects**

### **28 CFR Part 20**

Classified information, Crime, Intergovernmental relations, Investigations, Law Enforcement, Penalties, Privacy, Research, and Statistics.

### **28 CFR Part 22**

Crime, Juvenile delinquency, Penalties, Privacy, Research, and Statistics.

### **28 CFR Part 36**

Administrative practice and procedure, Alcoholism, Americans with disabilities, Buildings and facilities, Business and industry, Civil rights, Consumer protection, Drug abuse, Handicapped, Historic preservation, Individuals with disabilities, Penalties, Reporting and recordkeeping requirements.

### **28 CFR Part 68**

Administrative practice and procedure, Aliens, Citizenship and naturalization, Civil Rights, Discrimination in employment, Employment, Equal employment opportunity, Immigration, Nationality, Non-discrimination.

### **28 CFR Part 71**

Administrative practice and procedure, Claims, Fraud, Organization and function (Government agencies), Penalties.

### **28 CFR Part 76**

Administrative practice and procedure, Drug abuse, Drug traffic control, Penalties.

**28 CFR Part 85**

Administrative practice and procedure, Penalties.

Accordingly, for the reasons set forth in the preamble, the interim rule amending 28 CFR parts 20, 22, 36, 68, 71, 76, and 85, which was published at 81 FR 42491 on June 30, 2016, is adopted as a final rule without change.

Dated: April 1, 2019.

William P. Barr,  
Attorney General.

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